81-2100

Office - Supreme Court, U.S.
FILED
APR 27 1982
ALEXANDER L. STEVAS,
CLERK

Case No. _____

In the
SUPREME COURT
of the
UNITED STATES
OCTOBER TERM, 1981

DONALD H. STEPHENS
Petitioner

vs.

B. L. LOWERY et al
Respondents

PETITION for WRIT of CERTIORARI to the United States Court of Appeals for the Eleventh Circuit

DONALD H. STEPHENS,
appearing PRO SE
829 Belgrade Ave. N.E.
Atlanta, Ga. 30306
Phone (404) 875-6867

QUESTIONS PRESENTED

1. Where federal judge abstain from ruling on merits of a federal complaint and in a related state action plaintiff follows the instructions of the Supreme Court as stated in *England* vs. *Louisiana* by causing the basis of the federal complaint to appear on the face of the state record and therein reserves federal remedies; is it error for the federal judge to use said allegations to determine that the state action and judgment is the same cause of action and *res judicata* as to the federal claims?

2. Is a federal complaint against three city officials for violating the due process and involuntary servitude clauses of the Constitution the same cause of action as the violation of only state procedure by an administrative board?

3. Where defendants' attorney acts as judge (legal advisor of an administrative board) of a complaint against his client, is plaintiff's fundamental right of due process and to a fair hearing violated or is it mere "irregularities in hearing"?

PARTIES

In original federal action Mr. B. L. Lowery, James A. Smith, and J. K. Harper are only parties.

In the second consolidated action Mr. B. L. Lowery, James A. Smith, J. K. Harper, City of Atlanta Housing Appeals Board, City of Atlanta, Gloria Borders, Clara Axam, Jr., James Brooks, James Couth, Tom Fagan, Hamilton Glover, Byron Harris, J. M. Harris & Ferrin Y. Mathews are parties.

INDEX

Questions presented	1
Index	2
Citations	3
Opinions Below	3
Jurisdiction	3
Statutes	4
Statement of Case	5
Argument	7
Conclusion	9
Affidavit of Service	10
Notarized Statement of Mailing to Clerk	10
Appendix 1	11
Appendix 2	14
Appendix 3	15

CITATIONS

Clover v *Todd*, 237 Ga. 821	8
ENGLAND v *LOUISIANA*, 375 U.S. 411	1, 6, 7, 8
Masters v *Pardue*, 91 G.A. 684	8
New Jersey v *Burke*, 579 F. 2nd 764, 777 f.n. 52	7
WALL v *A.O.A.*, 379 F.S. 175, 188 [16, 17]	8
Fifth Amendment of U.S. Constitution	4
Thirteenth Amendment	4
28 U.S.C. Sec. 1254(1)	3
28 U.S.C. Sec. 1343	5
42 U.S.C. Sec. 1983, 1985(3)	5
Ga. Code Anno. 81A-121	8
Ga. Code Anno. 40-3301	4, 6
Atlanta Housing Code Sec. 15-16(c) & (d)	4,5

OPINION BELOW

The opinion of the district court is not reported. See Appendix 1. The order of the court of appeals is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1981. See Appendix 2. A petition for rehearing was denied on January 27, 1982. See Appendix 3.

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTES

1. Fifth Amendment

No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. Thirteenth Amendment

Neither slavery nor involuntary servitude, except as a punishment for crime * * * shall exist within the United States, or any place subject to their jurisdiction.

3. Atlanta Housing Code Section 15-16(c) & (d)

(c) PENALTY Each violation of a provision of the Atlanta Housing Code shall be punished by a fine of not less than Twenty-Five ($25.00) Dollars nor more than Five Hundred ($500.00) Dollars or imprisonment for not less than sixty (60) days nor more than six (6) months and each day shall be treated as a separate violation.

* * * Every day any violation of a provision of this Code exists shall constitute a separate offense. Each offense shall be punishable as provided in Section 15-16(c).

4. Ga. Code Anno. 40-3301

All meetings of any * * * board * * * of any * * * Municipal corporation * * * at which official actions are to be taken are hereby declared to be public meetings and shall be open to the public at all times. No * * * formal action shall be binding except as taken or made at such meetings. Any action contesting * * * formal action on the ground of nomcompliance with this law must be commenced within 90 days of the date * * * formal action was taken. * * * The superior courts of this State shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizen of this State.

STATEMENT OF CASE

Federal cause of action

Part of property at 829 Belgrade Ave. is owned by the City of Atlanta—a proposed but never built avenue thereon. Eddie Mae Stephens is recorded owner of remaining property.

Petitioner, Donald Stephens, is in *adverse* possession of right apartment of duplex thereon.

On October 7, 1977, City housing inspector and officials caused a notice and 'placard' to be attached to the right apartment. The 'placard' made it illegal to occupy said apartment.

Petitioner was living in the right apartment when the placard was attached. The apartment was never vacant in 1977. No hearing was held to require occupant to vacate the apartment.

Said officials in their answer admit: "Defendants has no legal right to summarily 'placard' an occupied apartment."

The notice required petitioner to remove from *City property* abandoned cars (not his), debris and trash, and overgrown bushes and weeds. There is no city ordinance requiring such work, and similar notices were not given to adjacent property owners.

Removal and repairs were to begin and be completed in *one day*.

Penalty for violating placard and notice is a $500 fine or imprisonment for not less than 60 days. *Each day of violation constitutes a separate violation.* Petitioner fears, as a practical matter, the federal decision will be considered as *res judicata* in prosecution of him. He is faced with a possible fine of $750,000 or a minimum of 250 years in prison because he has occupied the apartment since it was placarded.

Federal jurisdiction was invoked pursuant to 28 USC Sec. 1343 and 42 USC Sec. 1983, 1985(3).

Course of proceedings

Petitioner filed a federal complaint charging Mr. Lowery, Smith, and Harper, original defendants, with violation the due process and involuntary servitude clauses of the Constitution. Since the placard was effective upon posting, injunctive relief was needed. A temporary restraining order was requested. The

federal court abstained from ruling in the case; as is shown by summary of hearing from the docket sheet as follows:

"HEARING: Cause came on for hearing on petition for TRO. Court Denied the TRO and indicated the defendants should be in the Superior Court of Fulton County, but the case could remain filed in this Court; that Petitioner dismiss this case as soon as possible after the matter has been worked out by him & the City."

Donald Stephens then appealed the placard and notice to the Housing Appeals Board, an administrative review board.

Mr. Joe Harris, defendants attorney, appeared as legal advisor to the Board and advised it to dismiss the appeal.

Petitioner filed an application in the Superior Court of Fulton County alleging the Board held a closed hearing in violation of state Sunshine Law and asking the board's decision be declared void.

Federal defendants were not parties to the state action. However since they had an interest in the decision, plaintiff irregularly filed a *Notice of Voucher* (an invitation to defend to federal defendants). Upon motion from federal defendants the attempted voucher was dismissed for lack of personal jurisdiction over federal defendants.

Pursuant to *England* vs. *Louisiana*, 375 US 411 plaintiff made appear on the face of state record the basis of the federal complaint and in paragraph 12 he states: "Plaintifff filed suit in Federal Court contesting said papers. Plaintiff hereby reserves all remedies available to him in said suit." In paragraph 25 he distinguishes allegations necessary to prove state claim: "The allegations in paragraphs 17, 18, 22, 23, and 24 violate Ga. Code Anno. 40-3301."

Because of illness plaintiff had no actual notice of date of state hearing and action was dismissed for want of prosecution—which is judgment on merits that the Housing Appeals Board did not violate Georgia's Sunshine Law.

Petitioner filed second suit charging the Board conspired with original federal defendants through their attorney to deprive plaintiff of due process. Both federal actions were consolidated.

Summary judgment was entered against plaintiff on the ground that the state judgment was *res judicata* in both federal actions.

Plaintiff appealed, and Court of Appeals affirmed decision.

ARGUMENT

Question one

The appropriate consideration governing review is stated in this Court's Rule 17.1(a): "Where a federal court of appeals * * * has so far departed from accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision."

The Supreme Court has instructed us in *England* vs. *Louisiana,* 375 US 411, as to how to appear in a state action without waiving the right to maintain a related federal claim:

> Headnote 4. "A party may readily forestall any conclusion that he has elected not to return to the District Court by making on the state record an explicit reservation to the depositon of the entire case by the state courts; that is, he may inform the state court that he is exposing his federal claims there only for the purpose of complying with *Windsor* [353 US 364], and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions. P.421"
>
> Headnote 5. "However, such an explicit reservation is not indispensable, for a litigant is not to be denied his right to return to the District Court unless it clearly appears that he voluntarily did more than 'Windsor' required and fully litigated his federal claims in the state courts."

See also *New Jersey* vs. *Burke,* 579 F. 2nd 764, 774, n. 52

Petitioner followed said instructions by causing the basis of the federal claim to appear on the face of the state record and reserved his right to return to federal court.

In direct violation of *England,* the district court used said act to determine the state and federal actions were the same cause of action. Said action was sanctioned by the court of appeals by affirmation. Perhaps, only nominal consideration was given because appellant was appearing pro se.

The enormous workload of this Court is well known. However, if the instructions of this Court is applied in cases involving eminent attorneys only, the rule of law will be lost to most Americans.

There is no crediable argument against reversal; thus deposition of the case is simplied. Upon verification of facts from the record, a mandate could be issued requiring consideration of appeal on its merits in light of *England* vs. *Louisiana*.

Question two

The parties are different. The parties in the original federal action are Mr. Lowery, Smith, and Harper. The parties in the state action are the Housing Appeal Board, its chairperson, and its legal advisor.

Plaintiff did attempt to 'vouch in' the federal defendants. However, the state court decided it did not have personal jurisdicition over them and dismissed the attempt. "A vouchee is not a party defendant to a law action." *Masters* vs. *Pardue*, 91 G.A. 684. To become parties the court must enter an order making them defendants. *Clover* vs. *Todd*, 237 Ga. 821, Ga. Code Anno. 81A-121. For other purposes appellant did state the basis of his federal claim in the state action, but a cause of action can not be maintained against persons not parties to the action. Federal defendants themselves elected not to become parties. Their dismissal was for lack of jurisdiction and not on the merits. Thus nothing is *res judicata* with respect to them.

Question three

Mr. Joe Harris appeared both as defendants' attorney and legal advisor to the Housing Appeals Board. This is shown by pages 7, 8, and 10 of the deposition of Ms. Gloria Borders, chairperson of the Board.

The right to an impartial arbitrator is briefed in a three judge decision, *Wall* vs. *A.O.A.*, 379 F.S. 175, 188 n. 16, 17.

CONCLUSION

Whereas, Donald H. Stephens, petitioner, prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Eleventh Circuit in the above-mentioned case.

Donald H. Stephens
Petitioner

AFFIDAVIT OF SERVICE

Donald H. Stephens being duly sworn deposes and says:

He has served respondants with three copies of this petition by depositing in the United States mail an envelope containing said copies with adequate postage thereon and addressed to their attorneys as follows:

Mr. J.M. Harris, Jr. and Marve Jones Brooks
City Attorneys
Suite 2000, Bank of the South Building
Atlanta, Georgia 30335

NOTARIZED STATEMENT OF MAILING TO CLERK

He has mailed this PETITION for WRIT OF CERTIORARI by express mail at the Central City Station Post Office in Atlanta, Georgia, The package containing the petition had adequate postage thereon and was addressed to:

Michael Stevas
Clerk of the United States Supreme Court
one First St.
Washington, D.C. 20543

Said package was mailed on April 27, 1982. He personally mailed said package within the time permitted by law.

Subscribed and sworn to before
me this 27th day of April, 1982.

_____
Donald H. Stephens

_____
Notary Public

APPENDIX 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action C77-1767A Civil Action C79-1508A

ORDER

These consolidated cases are before the Court on defendants' motion for summary judgment. Defendants contend that the final judgment of dismissal in Donald H. Stephens v. Housing Appeals Board of the City of Atlanta, et al., Civil Action No. C-40561 (Superior Court of Fulton County; final judgment entered July 9, 1980),[1] acts as a bar to this litigation because of the doctrine of res judicata.

According to Professor Moore,

> A final, valid determination on the merits is conclusive on the parties and those in privity with them as to the matters adjudged, or which should have been litigated, in another action or proceeding involving the same cause of action.

1B Moore's Federal Practice, 0.405[3], pages 631-32.

A. Final determination on the merits

There is no question but that there has been a final, valid determination on the merits in the state court. On July 17, 1979, Judge McKenzie of the Superior Court of Fulton County dismissed C-40561 for want of prosecution. Plaintiff Stephens appealed that order of dismissal to the Court of Appeals of Georgia. The Court of Appeals affirmed the order of dismissal on January 18, 1980. The affirmance was made the final judgment of the state court by order of Judge McKenzie dated July 9, 1980. Under Georgia law, a dismissal for want of prosecution is an adjudication upon the merits. Ga. Code. Ann. 81A-141(b).

B. The Parties

Mr. Donald H. Stephens is the plaintiff in these consolidated cases and was the plaintiff in the state court action. The defendants in the state court action were the Housing Appeals Board and five listed members of the Board in their official capacities (four were later deleted); Assistant City Attorney J. M. Harris; and City Attorney Ferrin Y. Mathews. Plaintiff "vouched in" B. L. Lowery, Mr. James Smith, and J. K. Harper. In these two consolidated actions, the defendants are the Housing Appeals Board and seven listed members, both individual and official capacities; Assistant City Attorney J. M. Harris; City Attorney Ferrin Y. Mathews; the City of Atlanta; B. L. Lowery individually and as Chief Housing Code Inspector of the City of Atlanta; Mr. James A. Smith, individually and as Chief Housing Code Inspector of the City of Atlanta; and J. K. Harper, individually and as Area Inspector of the City of Atlanta. The only significant difference between the parties involved in the state court action and the parties in the consolidated federal cases is that the City itself is a defendant in the federal cases. Thus there is the substantial identity of parties required to invoke the doctrine. See generally 1b Moore's Federal Practice 0.411[1]; see also 0.405[9] (vouching in).

C. Cause of Action

Black's Law Dictionary (5th ed. 1979) defines a cause of action as "[t]he fact or facts which give a person a right to judicial relief. . . . A situation or state of facts which would entitle [a] party to sustain [an] action and give him the right to seek a judicial remedy in his behalf." The definition of 'cause of action' has proved difficult, however, in applying res judicata. Among the various tests which have developed are

> whether the same right is infringed by the same wrong; whether 'there is a measure of identity that a different judgment in the second action would destroy or impair the rights or interests established by the first judgment; identity of grounds; whether the same evidence would suffice to sustain both judgments.

1B Moore's Federal Practice, 0.410[1], page 1158 (citations omitted).

A careful comparison of the amended complaint in the state court action with those in these consolidated cases reveals that, what ever test is applied, the cause of action is essentially the same, the deeds of defendants of which plaintiff complains are essentially the same in the state and federal cases; the 'placarding' of his residence and irregularities in the hearing afforded plaintiff by the Atlanta Housing Appeals Board. The cast of plaintiff's state court complaint is oriented toward state law, and in that case plaintiff prayed for the court to set aside the Board's decision and to insure a fair hearing in compliance with due process. In the federal complaints, plaintiff casts his language in terms of the same acts of defendants being in violation of his federal procedural and substantive rights. He asked this Court to declare the placard to be illegal and also sought money damages. Plaintiff's demands vary slightly; the facts complained of are the same; the only noteworthy difference in the cases is the different legal theories pursued. Res judicata, however, acts as a bar not only as to the theories asserted in the state court action but as to every legal theory that might have been asserted. "This applicaton of the doctrine of res judicata operates 'to prevent the splitting of a single cause of action and the use of several grounds for recovery under the same action as the basis for separate suits.'" 1B Moore's Federal Practice 0.410[2], pages 1162-64. Since the cause of action is the same in these cases as in C-40561, in which judgment was rendered against plaintiff and in favor of defendants, res judicata bars this litigation. Defendants' motion for summary judgment is GRANTED. The trial set for December 15, 1980 is unnecessary and judgment shall be entered for defendants.

IT IS SO ORDERED, this 8 day of December, 1980.

[signature]

Marvin H. Shoob, Judge
United States District Court
Northern District of Georgia

APPENDIX 2

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

NO. 80-9061

Summary Calender

Donald H. Stephens
Plaintiff-Appellant,
v.
B. L. Lowery, James A. Smith
and J. K. Harper, et al.,
Defendants,-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

(September 10, 1981)

Before HILL, FAY, and ANDERSON, Circuit Judges.
PER CURIAM:

The order of Judge Shoob, United States District Court, Northern District of Georgia, dated December 5, 1098, granting the defendant's motion for summary judgment is affirmed.

AFFIRMED.

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*
UNIT B

NO. 80-9061

Donald H. Stephens,
Plaintiff-appellant,
versus
B. L. Lowery, James A. Smith and J. K. Harper, et al.,
Defendants-appellees.
Appeal from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC
(Opinion September 10, 1981)

Before HILL, FAY AND ANDERSON, Circuit Judges
PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this administrative Unit in regular active service having requested that the Court be polled on rehearing en blanc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for rehearing En Blanc is DENIED.

( ) The petition • • •

ENTERED FOR THE COURT:
[SIGNATURE] James C. Hill
United States Circuit Judge

*Former Fifth Circuit Case; (Section 9(1) of Public Law 96-452-October 14, 1981)